

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC:LM:FSH:MAN:2:TL-N-2852-01

VATaverna

date:

to: Henry Singleton, Territory Manager, Financial Services  
ATTN: Revenue Agent Richard Bosch

from: Area Counsel  
(Financial Services)

subject:

Form 872 - [REDACTED], [REDACTED], [REDACTED] and [REDACTED] Taxable Years

Consent to Extend the Statute of Limitations on Assessment  
Statute of Limitations Expires: December 31, [REDACTED]

UIL Nos. 6501.08-00, 6501.08-09, 6501.08-17  
6511.01-03

This memorandum responds to your request for assistance dated May 1, 2001. This memorandum should not be cited as precedent. Specifically you have requested that we provide you with the appropriate language to use on a restricted Form 872 (Consent to Extend the Time to Assess Tax) for [REDACTED]'s [REDACTED], [REDACTED], [REDACTED] and [REDACTED] taxable years.

The advice given below is subject to post review by the Chief Counsel's National Office. Therefore, we ask that you wait ten working days from the date of this memorandum, or until you earlier hear of approval, before acting on this advice.

Issue

Whether a restricted Form 872 is necessary when the only remaining item at issue is whether the taxpayer is entitled to claim a specified liability loss pursuant to I.R.C. § 172(f), which item was raised in claims for refund (Forms 1120X) for the taxpayer's [REDACTED] through [REDACTED] tax years and partially disallowed by the Examination Team?

Facts

[REDACTED] ("[REDACTED]" or "the taxpayer") timely filed its [REDACTED] through [REDACTED] (the "taxable years") corporate federal income tax returns (Form 1120). The statute of

limitations for these taxable years was previously extended to December 31, [REDACTED]. The Examination Team has concluded its audit of the taxpayer's [REDACTED] through [REDACTED] corporate federal income tax returns, as filed. All proposed adjustments for these years have been agreed to by the taxpayer. The audit adjustments resulted in no change in the amount of tax due for the taxpayer's [REDACTED], [REDACTED] and [REDACTED] tax years. For the [REDACTED] tax year, the adjustments resulted in a refund of tax to the taxpayer.

During the course of the audit, [REDACTED] filed [REDACTED] Forms 1120X for itself and its subsidiaries. [REDACTED] of these Forms 1120X (for the periods ending [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED]) claimed a specified liability loss pursuant to I.R.C. § 172(f).<sup>1</sup> This claimed specified liability loss created a net operating loss for tax years prior to [REDACTED], which the taxpayer is attempting to carry back to earlier tax years, thereby claiming a refund of taxes paid. After examination of these Forms 1120X, the Examination Team hand delivered to the taxpayer two (2) thirty-day letters disallowing part of the refund claim resulting from the claimed specified liability loss.

On [REDACTED], three (3) Letters 950(DO) and three (3) Letters 569 (DO) were hand delivered by the Examination Team to the taxpayer's tax manager. The Letters 950(DO) are reports showing proposed changes to the taxpayer's Forms 1120 for the tax periods May 31, [REDACTED], May 31, [REDACTED], May 31, [REDACTED], and December 31, [REDACTED] through December 31, [REDACTED]. The Letters 569 (DO) state that the taxpayer's claims on behalf of [REDACTED] F/K/A/ [REDACTED], for the tax periods December 31, [REDACTED] through December 31, [REDACTED] and [REDACTED] for the tax periods December 31, [REDACTED] and December 31, [REDACTED] through December 31, [REDACTED] were disallowed. These Letters 569(DO) specifically state that the reason for the disallowance is that the amounts claimed as specified liability losses did not qualify for the special ten-year carryback. The Letters 569(DO) further enclose Forms 2297, Waiver of Statutory Notification of Claim Disallowance. These Letters 569 (DO) were not sent to the taxpayer by certified or registered mail.

[REDACTED] wants to pursue the disallowed portions of the claims for refund with the Service's Appeals Division. However, before pursuing these claims the taxpayer had wanted to await the Supreme Court's opinion in the case of United Dominion Industries Inc. v. United States, 208 F.3d 452 (4<sup>th</sup> Cir. 2000), rev'd and remanded, 2001 LEXIS 4124 (June 4, 2001), which opinion was

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<sup>1</sup> We are not opining as to the substance of the taxpayer's refund claim.

rendered on June 4, 2001. The taxpayer requested that its case remain open in Examination and not be transferred to Appeals pending the Supreme Court's opinion in the United Dominion case. Because of the taxpayer's request, you want [REDACTED] to execute a Form 872 for the open audit years. However, [REDACTED] is willing to only sign a restricted Form 872 for the specified liability loss issue.

### Discussion

Unless the Examination Team believes that it is necessary to protect the interests of the Government with respect to the audit of the taxpayer, it is our opinion that in the instant case, it is unnecessary to execute a Form 872 for the taxpayer to pursue its claims for refund. The only item remaining in issue is whether the taxpayer is entitled to a refund of taxes from its claim that it is entitled to specified liability losses pursuant to I.R.C. § 172(f). This item was raised in claims for refund (Forms 1120X) for the taxpayer's [REDACTED] through [REDACTED] tax years. A portion of the taxpayer's claims for refund was disallowed by the Examination Team. As the taxpayer has timely filed refund claims related to the specified liability losses, it can pursue the disallowed refund claims through a refund suit, if necessary.

In general, the statute of limitations on assessment expires three years from the date the original tax return for such tax is filed. I.R.C. § 6501(a). The statute of limitations for the assessment of a tax deficiency that is attributable to a net operating loss carryback (including assessments relating to quick refunds) is determined by reference to the statute of limitations on assessment for the loss year. I.R.C. §§ 6501(a), 6501(h). Thus, if the limitations period for the loss year has not expired, the limitations period for the carryback year remains open, but only to the extent of the refund generated by the carryback. Section 6501(c)(4), however, provides an exception to the general three year statute of limitations on assessment. This exception provides that the Secretary and the taxpayer may consent in writing to an agreement to extend the statute of limitations. The Service uses the Form 872 to memorialize such consent.

In general, the statute of limitations on credit or refund expires three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within two years from the time the tax was paid. I.R.C. § 6511(a). If the refund claim relates to a net operating loss or a capital loss carryback, the period extends to three years after the time prescribed for filing the return (including extensions)

for the tax year of the net operating loss or capital loss carryback. I.R.C. 6511(d)(2)(A). Where the parties extend the period for assessment of tax, the period for filing a claim for refund is also extended and does not expire until six months after the expiration of the period within which an assessment may be made pursuant to the agreement. I.R.C. § 6511(c)(1).

A Form 872 extends the time to assess or collect tax. It also extends the time within which a claim for refund may be made. I.R.C. § 6511(c). In the instant case, it is unnecessary to execute a Form 872. First, no assessment of tax will be made since the audit is complete, and no additional adjustments have been proposed. Second, [REDACTED] has already filed a claim for refund that has been partially denied. The only issue that remains unresolved is [REDACTED]'s claim for refund, which would not result in an assessment. Third, the Service still has the ability to make adjustments to offset the NOLs. See Cashman v. United States, 90-1 U.S.T.C. ¶50,264 (Dist. Ct Dist. Nev. 1990) (Simply because the statute of limitations expires for the Service to assert a deficiency assessment does not bar the Service from asserting as a defense, in the nature of a setoff, the impropriety of some deduction previously allowed with respect to the return for which the taxpayer seeks a refund).

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

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